FILED
APR 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1483

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

DAVID T. JORDAN,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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10 pp

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I. CLAYTON'S PETITION WAS TIMELY FILED

A timely petition for rehearing tolls the running of the 90-day period in which a petition for certiorari may be filed because it suspends the effectiveness of the Court of Appeals' initial determination of the case. *Department of Banking v. Pink,* 317 U.S. 264, 266 (1942). Clayton timely filed a petition for rehearing *en banc* with the U.S. Court of Appeals for the Eighth Circuit. The U.S. Court of Appeals for the Eighth Circuit treats all such petitions as also requesting rehearing by the panel, as is reflected by the Eighth Circuit's Order of December 8, 1988, denying both rehearing and rehearing *en banc.*

The mandate of the court of appeals issues 21 days after entry of the judgment. Federal Rule of Appellate Procedure, Rule 41(a)(1988). Timely filing of a Petition for Rehearing stays issuance of the court's mandate, with the mandate then issuing within 7 days after an order denying the petition. *Id.* The mandate in this case did not issue until after entry of the court's Order of December 8, 1988, denying both rehearing and rehearing *en banc*. Therefore, because Clayton's petition was sufficient to bring its request before the panel, the judgment of the Court did not become final until December 8, 1988, and Clayton's petition for rehearing *en banc* effectively suspended the time in which Clayton was permitted to file its petition for writ of certiorari with the Court. *See* Stern, Gressman & Shapiro, Supreme Court Practice (6th Ed.), § 6.3 at 313 (1986).

II. THE COURT SHOULD DECIDE THE QUESTIONS RAISED BY CLAYTON'S PETITION

Jordan does not dispute the significance of the Questions 1, 3 and 4 raised by Clayton's Petition for Certiorari, but rather, argues that the Court should decline to hear these questions on the grounds that they were not adequately presented to the District Court or the Court of Appeals. The Court should reject Jordan's argument and address each of the issues raised by Clayton's Petition.

The Supreme Court has jurisdiction to review the judgments of state courts by virtue of 28 U.S.C. § 1257(a). Section 1257(a) expressly states that the Court may review state court decisions when treaties or statutes of the United States are involved or when the parties have specifically raised a federal question. 28 U.S.C.A. § 1257(a) (Supp. 1989).

Despite this language, decisions of this Court establish that the failure to present a question to the lower courts does not deprive the Court of jurisdiction to decide that question, but rather, the tendency to refrain from hearing such cases is found-

ed solely upon prudential concerns. *See, e.g., Bankers Life and Casualty Co. v. Crenshaw,* 108 S. Ct. 1645, 1651 (1988); *Illinois v. Gates,* 462 U.S. 213, 217-220 (1983). In both *Bankers Life* and *Gates,* the Court was faced with petitions for certiorari to state courts.

Although the punitive damages in this case were awarded under a state law theory, the case was tried in a federal district court and appealed to the United States Court of Appeals for the Eighth Circuit. Therefore, this Court's jurisdiction to review the decision of the Court of Appeals is founded on 28 U.S.C. § 1254(1), rather than Section 1257. Unlike Section 1257, Section 1254(1) does not even purport to require that the federal question has been raised in the lower courts as a jurisdictional prerequisite to a writ of certiorari. Clearly then, if the Court has the power to hear questions on a writ of certiorari which were not previously presented to state courts, it has the power to hear such questions on petitions for writ of certiorari from the United States Courts of Appeals.

A. This Is An Appropriate Case To Review What Limits The Excessive Fines Clause Imposes On Punitive Damage Awards

Jordan argues that the Court should refuse to decide whether the punitive damage award in this case violated the Eighth Amendment's prohibition of excessive fines because Clayton did not challenge the constitutionality of the punitive damage award in the lower courts, but rather argued that the award was excessive as a matter of state law. The concerns which have led the Court to refrain from hearing questions presented for the first time in a petition for certiorari are those of comity and a need to have a fully developed record on appeal. *See Illinois v. Gates,* 462 U.S. at 221-23. This case presents neither of those concerns.

Clayton's constitutional challenge to the punitive damage award assessed against it does not run afoul of any principles of

comity because, unlike *Bankers Life and Casualty Co. v. Crenshaw, supra,* this case was heard exclusively by the federal courts. Therefore, addressing the constitutional issues at this juncture will not deprive the Missouri courts of the opportunity to have interpreted Missouri's law regarding punitive damages in a way that would have been consistent with the United States Constitution.

Furthermore, the Court has already agreed to determine whether the Excessive Fines Clause of the Eighth Amendment to the Constitution of the United States applies to awards of punitive damages in civil cases. *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.,* 845 F.2d 404 (2d Cir. 1988), *cert. granted,* 57 U.S.L.W. 3394 (U.S. Dec. 5, 1988) (No. 88-556). Should the Court decide that the excessive fines clause does apply to civil awards of punitive damages, it will then become necessary to provide some guidance as to what fines may be considered excessive under the Constitution. Because the lower courts specifically held that the punitive damage award in this case was not excessive under Missouri law, this case presents an appropriate vehicle to discuss what fines may be considered excessive under the Eighth Amendment.

There is no need for further development of the record in order to resolve this question. Whether the punitive damage award in this case was excessive under the law of Missouri was fully and vigorously argued by both parties, and was resolved by the lower courts in favor of Jordan. This Court is thus presented with a fully developed record as to the criteria by which Missouri determines the amount of punitive damage awards. Whether those criteria produced an award which is consistent with the Eighth Amendment is a legal question requiring no further examination or appraisal of evidence. In such a case, there is no reason for the Court to refuse to consider the question presented. *See, e.g., Kiefer-Stewart v. Seagram,* 340 U.S. 211, 215 (1951).

B. Clayton Has Not Waived Consideration Of The Equal Protection And Due Process Issues Raised By Question 3

Question 3 of Clayton's Petition asks the Court to consider whether the Due Process and Equal Protection Clauses are implicated by proceedings which allow a lay jury to both determine fault and assess penalties, permits penalties to be influenced by the degree of the defendant's wealth, and permits such evidence to be presented prior to any finding of culpability. Jordan misinterprets question 3 as suggesting that bifurcated proceedings are constitutionally required in any punitive damages case, and thus argues that Clayton has waived consideration of this question because it did not move for a bifurcated trial in the District Court.

While it is conceivable that bifurcated proceedings may alleviate some of the problems presented by punitive damage cases, Clayton does not argue that bifurcation is *the* constitutionally prescribed remedy for those concerns. Clayton merely asks the Court to determine whether such proceedings are constitutionally infirm.

If the Court determines that the proceedings followed in this case violated Clayton's rights to due process and equal protection, one potential remedy might be a limiting instruction. In fact, Clayton raised an equal protection objection at the instruction conference in the District Court, and requested a limiting instruction concerning the evidence of Clayton's net worth. This request was denied. Therefore, Clayton did present its equal protection arguments to the District Court. Furthermore, Clayton raised its equal protection objections on appeal to the Eighth Circuit.

C. This Court Should Determine Whether The Commodity Exchange Act Preempts State Law.

The punitive damage award in this case was based on a common law theory of breach of fiduciary duty. Question 4 of

Clayton's Petition asks the Court to determine whether that common law remedy has been preempted by Sections 4b and 4c of the Commodity Exchange Act ("CEA"), as amended. 7 U.S.C. § 6b, 6c. Jordan argues that the Court should not consider this question because Clayton failed to argue its preemption objections in the lower courts. Clayton did not pursue the preemption argument in the lower courts because to do so would have been futile after the decision in *Kerr v. First Commodity Corp. of Boston,* 735 F.2d 281 (8th Cir. 1984), holding that the CEA did not preempt state law remedies. Further, Clayton did not raise the preemption issue in the Court of Appeals because it is the practice of the Eighth Circuit that each panel of the court is bound by the prior decisions of the court. *See United States v. Lewellyn,* 723 F.2d 615, 616 (8th Cir. 1983); *United States v. Howard,* 706 F.2d 267, 269 (8th Cir.) *cert. denied,* 464 U.S. 934 (1983).

The Court should address the preemption question. As noted in Clayton's Petition for Writ of Certiorari, this question has been resolved in conflicting fashion among the lower courts, and presents a question of substantial importance to the commodity futures industry. Furthermore, the Eighth Circuit fully considered the question and explained its reasons for finding that state law remedies are not preempted by the CEA in its opinion in *Kerr v. First Commodity Corp. of Boston, supra.* Therefore, this Court has an ample basis upon which to evaluate the reasoning of the Eighth Circuit regarding the preemption question, and no further development of the record is needed to decide this question.

Respectfully submitted,

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